



June 16, 2017

**Via Electronic Mail and FOIA Online**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

Re: FOIA Request Regarding Air Quality Designations

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA) and on behalf of the Natural Resources Defense Council (NRDC), we request copies of the following records<sup>1</sup>:

- A. All exceptional event petitions, and any EPA responses thereto, that any and all states submitted for ozone levels experienced between Jan. 1, 2013, and Dec. 31, 2016, inclusive; and
- B. All letters sent by EPA, signed by Administrator Pruitt, to the states on or around June 6, 2017, informing them of his decision to extend EPA's deadline for promulgating initial area designations under the 2015 national ambient air quality standards for ozone.

In this context, "states" refers to the 50 states of the United States, the District of Columbia, Tribes, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Relevant to (A), you may omit the materials EPA has posted publicly at <https://www.epa.gov/air-quality-analysis/exceptional-events-documents-ozone-washoe-nv>. Relevant to (B), you may omit Mr. Pruitt's letter to Arizona Governor Doug Ducey, which EPA has publicly posted at <https://www.epa.gov/ozone-designations/administrator-extends-deadline-area-designations-2015-ozone-standards>.

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<sup>1</sup> As used throughout this letter, the terms "record" and "records" shall mean all materials in whatever form (handwritten, typed, electronic, or otherwise produced, recorded, reproduced or stored) in EPA's possession, including, but not limited to, any correspondence, minutes of meetings, memoranda, notes, e-mails, notices, electronic files, internet chat logs, tapes, photos, videos, text messages, and telefaxes. Note that this request specifically seeks responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any government purpose.

To the extent that records responsive to this request are available in a widely-used electronic format (*e.g.*, pdf, Excel, Word, or WordPerfect files), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the Clean Air Act.

Should you nonetheless invoke a FOIA exemption with regard to some or all of any of the requested records, please include in your full or partial denial letter sufficient information for NRDC to appeal the denial, including:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record. If the requested documents do not exist, please indicate that in your written response.

We also request that EPA release responsive records as soon as they are available, on a rolling basis, but in no event later than 20 days, as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send it immediately while EPA searches for other records.

### **REQUEST FOR FEE WAIVER**

We request that you waive all fees in connection with this matter. As shown below, NRDC meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA's fee waiver regulations at 40 C.F.R. § 2.107. In particular, disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

#### **I. NRDC SATISFIES THE FIRST FEE WAIVER REQUIREMENT.**

The disclosure requested here would be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors EPA uses to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

##### **A. The subject of the request concerns the operations or activities of the government.**

The subject matter of this request relates to the implementation of the 2015 ozone standards, which significantly affects public health and welfare. It is clear that such actions, as

well as EPA's overall implementation and execution of environmental laws, are specific and identifiable activities of an executive branch agency of the government. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) ("[R]easonable specificity" is "all that FOIA requires" with regard to this factor). Thus, this FOIA request plainly concerns the operations or activities of the government.

B. The disclosure is "likely to contribute" to an understanding of government operations or activities (the informative value of the information to be disclosed).

There is no question that the records requested will contribute to an understanding of federal government operations. The request likely will result in disclosure of records not already in the public domain. To our knowledge, EPA does not have a publicly available database of all exceptional event requests and EPA responses. Nor has EPA made public copies of all the letters sent to states announcing its decision to delay designations under the 2015 ozone NAAQS. The requested records thus will reveal information to which the public currently lacks access regarding a topic in which it has considerable interest: governmental regulation of air pollution. Thus, production of the requested records is "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(2).

The requested records will also likely provide new information about communications by and input from states regarding what they consider to be "exceptional events" that they believe should not count in determining whether an area is in attainment of national ambient air quality standards under the Clean Air Act, and how EPA responded. *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987) (FOIA's legislative history "suggests that information has more . . . potential [to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations."). Accordingly, the records NRDC seeks through this request will provide important oversight of EPA operations by revealing information of interest to the public. *See Community Legal Services v. HUD*, 405 F. Supp. 2d 553, 560 (E.D. Pa. 2005) ("[T]he CLS request would likely shed light on information that is new to the interested public.").

C. The disclosure of the requested information will contribute to "public understanding."

NRDC's extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC can and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch*, 326 F.3d at 1314 (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information

requested here. NRDC's more than one million members and online activists are "a broad audience of persons interested in the subject" of the Administration's views and opinions with respect to EPA. 40 C.F.R. § 2.107(l)(2)(iii). When combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 40 C.F.R. § 2.107(l)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. These include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org>, is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions>.
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter>.
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers), Twitter (195,426 followers), Instagram (37,868 followers), YouTube (19,518 subscribers), and LinkedIn (9,108 followers). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, [\*Stories from the Gulf\*](#), and [\*Acid Test\*](#), narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post; and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell);
- Issue brief, "The Untapped Potential of California's Water Supply: Efficiency, Reuse, and Stormwater," June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann); *see also* "Saving Water in California," *N.Y. Times*, July 9, 2014 (discussing the report's estimates);
- Article, "Waves of phony charges over new clean water safeguards," *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner);

- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” Nat’l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012;
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall);
- NRDC Document Bank, <http://docs.nrdc.org/>.

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe”. *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report).
- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA’s part to ensure the safety of these drug additives. *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report).
- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report); *see also* William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?” *Harper’s Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC).
- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of

military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report). The report also relied upon and synthesized information from other sources. After the report's publication, the sonar issue continued to attract widespread public attention. *See, e.g.,* "Protest Raised over New Tests of Naval Sonar," Nat'l Pub. Radio, *All Things Considered*, July 24, 2007.

- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004.
- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents. NRDC's efforts cast light on an issue of considerable public interest. *See, e.g.,* Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22.
- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002; Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19.
- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp>. The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; *see also* Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report).

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

- D. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

The foregoing discussion makes clear that disclosure is likely to provide new information to the public that will contribute significantly to its understanding of the implementation of environmental and public health protections established by the government. The request seeks information that is not publicly available about implementation of the 2015 ozone standard, a key health protection for the public. The records are likely to significantly contribute to public understanding of such matters.

## **II. NRDC SATISFIES THE SECOND FEE WAIVER REQUIREMENT.**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Judicial Watch*, 326 F.3d at 1312 (internal citation omitted); *see Natural Res. Def. Council v. EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the subject of this request. As noted above, the requested records relate to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the underlying subject matter.

For all the foregoing reasons, dissemination of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government. Accordingly, we request that you waive all fees in connection with this request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

If you deny this fee waiver request, in whole or in part, please notify us before incurring search and copy expenses.

## **CONCLUSION**

Please email or (if it is not possible to email) mail the requested records to me at the office address listed below. Please send them on a rolling basis; EPA’s search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104 (describing response deadlines). If EPA concludes that any of the records requested here are publicly available, please let me know.

If you find that this request is unclear in any way, or that the number of records responsive to this request is relatively large or difficult to copy, please do not hesitate to call me at 202-797-5245. You can also reach me by email at: [sjohnson@earthjustice.org](mailto:sjohnson@earthjustice.org).

Thank you for your assistance.

Sincerely,

/s/Seth L. Johnson

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